



## MEMORANDUM

From: Andrew J. Heimert, Executive Director & General Counsel

To: All Commissioners

cc: Commission Staff

Date: February 25, 2005 [Revised version]

Re: Study Groups

The following is a list of the study groups for the next phase of the Commission's work.

A more complete description of the specific issues appears in the attached list of issues selected for study by the Commission.

1. Enforcement Institutions
  - Dual federal enforcement (FTC and DoJ)/ Harmonization of FTC and DoJ rules/procedures
  - State attorneys general
2. Merger Enforcement
  - The Hart-Scott-Rodino/Second Request merger review process
  - Substantive merger analysis/efficiencies
3. Remedies
  - Rights and remedies in private litigation (*Illinois Brick*, treble damages, contribution, offset, injunctive relief)
  - Remedies available to governmental agencies
4. "New Economy" Issues
  - Antitrust analysis applied to industries characterized by significant technological innovation
  - Balancing the protection of IP rights and promotion of competition
5. Robinson-Patman Act
6. Exclusionary Conduct

7. Immunities and Exemptions
  - Immunities and exemptions
  - *Noerr-Pennington*
  - State Action
8. Regulated Industries
  - Antitrust enforcement by federal regulatory agencies
  - Implied immunity and savings clauses
  - Industry-specific standards
9. Criminal
  - Sentencing Guidelines issues [Deferred]
10. International
  - Clarifications to FTAIA
  - Coordination with non-U.S. authorities

Issues pending Commission decision

- Imposing time limits on federal civil and criminal investigations
- Harmonization of multi-jurisdictional procedures
- Studying the effectiveness of enforcement efforts

## Attachment

### ISSUES SELECTED FOR STUDY

(Numbers refer to issue numbering contained in the Working Group memoranda)

#### Civil Procedure & Remedies

1. Should the substantive law and procedures applicable to indirect purchaser litigation arising out of competition-related offenses be modified to reduce the complexity and inefficiency now present? [Remedies Study Group]
2. What changes, if any, should be made to the enforcement role that the states play with respect to federal antitrust laws? [Enforcement Institutions Study Group]
3. What should be the remedies and legal liabilities in private antitrust proceedings? [Remedies Study Group]
7. Should government civil remedies be expanded, restricted, or clarified? [Remedies Study Group]
6. Should the agencies establish timetables for investigating and deciding civil non-merger matters? [Deferred for additional fact-finding]

#### Criminal Procedure & Remedies

1. Should Section 3 of the Robinson-Patman Act (providing for criminal penalties) be repealed? [Robinson-Patman Act Study Group]
2. Should the statutes establishing criminal fines for price fixing and related offenses be amended in light of recent Supreme Court decisions casting doubt on the status of the Federal Sentencing Guidelines? [Criminal Study Group]
7. Should antitrust criminal investigations be made more efficient and shorter? [Deferred for additional fact-finding]

#### Immunities and Exemptions

1. Should antitrust immunities and exemptions be eliminated if not justified by the benefits they provide, or should they otherwise be time-limited? [Immunities & Exemptions Study Group]
2. Should the state action doctrine be clarified or otherwise changed? [Immunities & Exemptions Study Group]
3. Should the *Noerr-Pennington* doctrine be clarified or otherwise changed? [Immunities & Exemptions Study Group]

#### Intellectual Property

1. Should industries involving significant technological innovation be treated differently under the antitrust laws? [“New Economy” Study Group]

2. How does the current intellectual property regime affect competition? [“New Economy” Study Group]

### International

1. Should the FTAIA be amended to clarify the circumstances in which the Sherman Act applies to extraterritorial anticompetitive conduct? [International Study Group]
2. Should the antitrust exemptions for exporters set forth in the Webb-Pomerene Act and Title III of the Export Trading Company Act be eliminated? [Immunities & Exemptions Study Group]
3. Are there technical or procedural changes that the United States could implement to facilitate further coordination with foreign antitrust enforcement authorities? [International Study Group]

### Mergers, Acquisitions, and Joint Ventures

1. Should merger enforcement at the federal level continue to be administered by two separate agencies, the U.S. Department of Justice and the Federal Trade Commission? If so, should merger review responsibility be divided by industry between DOJ and FTC? [Enforcement Institutions Study Group]
2. To the extent that dual enforcement continues, should steps be taken to eliminate differences in treatment arising out of which agency reviews a merger? [Enforcement Institutions Study Group]
3. Should the Hart-Scott-Rodino merger review process be revised to address issues relating to the number and type of transactions requiring pre-merger notification, the length of investigations, the burden imposed by “Second Requests” and civil investigative demands on the merging companies and third parties, and transparency of the enforcement agencies’ decisional process? [Merger Enforcement Study Group]
4. What role, if any, should private parties and state attorneys general play in merger enforcement? Should merger enforcement be limited to the federal level, or should other steps be taken to ensure that a single merger will not be subject to challenge by multiple private and government enforcers? [Enforcement Institutions Study Group]
5. Are the federal enforcement agencies and courts appropriately considering efficiencies expected to be realized from transactions? [Merger Enforcement Study Group]
6. Has current U.S. merger enforcement policy — including as expressed in the *Horizontal Merger Guidelines* — been effective in ensuring competitively operating markets without unduly hampering the ability of companies to operate efficiently and compete in global markets? [Merger Enforcement Study Group]
8. Should steps be taken to attempt to harmonize further the procedural aspects of review of mergers by the United States and non-U.S. competition authorities in order to ensure a more timely and less burdensome multi-jurisdictional review of international mergers? [Deferred for additional fact-finding]

### Regulated Industries

1. How should responsibility for the enforcement of antitrust laws in regulated industries be divided between the antitrust agencies and other regulatory agencies? [Regulated Industries Study Group]
2. What is the appropriate standard for determining the extent to which the antitrust laws apply to regulated industries where the regulatory structure contains no specific antitrust exemption and/or contains a specific antitrust savings clause? [Regulated Industries Study Group]
3. Should Congress and regulatory agencies set industry-specific standards for particular antitrust violations that may conflict with general standards for the same violations? [Regulated Industries Study Group]

### Single-Firm Conduct

1. Are there features of the modern (or “new”) economy that warrant different treatment — whether harsher or more lenient — of single-firm or vertical conduct in “new economy” industries? [“New Economy” Study Group]
2. Should the Robinson-Patman Act be repealed in whole or in part, or otherwise be modified? [Robinson-Patman Act Study Group]
3. Should the substantive standards for determining whether conduct is exclusionary or anticompetitive under either Section 1 or Section 2 of the Sherman Act be revisited? [Exclusionary Conduct Study Group]

### Additional Issue

Undertake a comprehensive empirical examination of the effects of antitrust enforcement on consumers and the economy. [Deferred for additional development]